KORDIAL KOR KUNDANG SINGH

v.

EC CONTROLLED DEMOLITION SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-300-1997]
1 APRIL 2002

CIVIL PROCEDURE: *Affidavits - Admissibility - Jurat - Interpretation of language used - Failure to comply with rules on interpretation - Whether rendered jurat defective - Whether affidavits irregular - Rules of the High Court 1980, O. 41 r. 1(8)*

The plaintiff, a Singaporean citizen, applied *vide* an *ex parte* summons in chambers (encl 71) to restrain the third defendant from dealing with the first defendant in any way and to deposit all the share certificates and transfer forms with this court. She also applied for the first defendant's accounts to be frozen. She contended that the second defendant, her husband, had transferred a certain amount of shares to the third defendant. But she added that the latter was a mere nominee of the second defendant and that the third defendant should not be allowed to deal with the said shares in any way so as to prevent irreparable damage caused to the plaintiff. Enclosure 71 was supported by an affidavit in encl. 70 which was affirmed by the plaintiff.

The court granted the plaintiff's application for the injunction and ordered for the matter to be heard inter partes at a later date. On the trial date, the defendants raised an objection to the admissibility of the affidavit in encl. 70. It was submitted that the jurat in the affidavit was defective in that there was non-compliance with O. 41 r. 1(8) of the Rules of the High Court 1980.

Held:

[1] The purpose of the jurat in Form 78(d) is crystal clear. It is when a deponent files an affidavit not in the language of the court, then the person who interprets it to the language of the court must first take oath. But in the event the interpretation was done by the court interpreter, then using Form 78(d) the court interpreter need not take oath. (p 304 c)

[2] In affirming the affidavit in encl 70 which was prepared in the Malay language, being the language of the court, the plaintiff, a Singaporean citizen, needed the services of an interpreter who would interpret it to her in the English language. (p 306 b-c)

[2a] In the present case, it was quite apparent that the jurat did not state that the commissioner of oaths had taken an oath before interpreting as required under Form (d). As the jurat was rendered defective, there was no valid affidavit in support of the summons in chambers in encl 71. That affidavit in support in encl 70 was a defective affidavit because it was tainted with a defective jurat. (p 305 b-e)

[3] The plaintiff also filed another affidavit, ie encl 75, and that too suffered from the same defects contained in encl. 70. It failed to state that the commissioner of oaths in question had interpreted the contents of the said affidavit to the deponent, ie, the plaintiff herself. Furthermore, there was no indication that the interpretation was conducted by a certified interpreter. (pp 309 a-h & 310 a-c)

[4] When a party moved a court on an *ex parte* application, the court would invariably rely on the affidavit in support and would naturally expect due compliance with the rules, considering that the court would not hear the adversary at that point of time. Being defective, both encls. 70 and 75 must be disregarded. Without the affidavit in encl 70, the summons in chambers in encl 71 must automatically collapse. (p 310 f-g)

[5] Where an affidavit is irregular in form, the court may give leave for that affidavit to be filed or used in evidence under O. 41 r. 4 of the RHC. However, in the present case, the irregularity was not in regard to the form but rather in regard to the substance of the matter and this could not be cured under O. 2 r. 1 of the RHC. (p 314 a-b)

[6] The third defendant's application to have the shares which were deposited in court pursuant to the *ex parte* interim injunction be returned, was granted. (p 321 e)

[7] The plaintiff's oral application for a stay pending appeal was denied and was instead advised to file a formal application. There were no special circumstances to warrant a stay and there was the need to exercise great care and circumspection so as to not to drive the first and the third defendants from the judgment seat. (p 322 a)

[Enclosures 70 and 75 disregarded. Inter partes hearing for encl 71 dismissed with costs.]

[Ex parte order in encl 73 discharged; damages to be assessed by deputy registrar.

Case(s) referred to:

BSN Commercial Bank (M) Bhd v. Pentadbir Tanah Daerah, Mersing [1997] 3 CLJ Supp 1 ***(refd)***

BSN Merchant Bank Bhd v. Perikanan LKPP Fort Sdn Bhd (Mallal's Digest, 4th edn, 2001 Reissue, vol 2(1), p 129) ***(refd)***

Commonwealth & Co. v. Peninsular & Co [1923] App Cas 191 ***(refd)***

Dato' Wong Gek Meng v. Pathmanathan Mylvaganam & Ors [1998] 1 CLJ 625 ***(refd)***

Datuk Bandar Kuala Lumpur v. Seman Amat & Other Cases [1996] 3 CLJ 263 ***(refd)***

Dr Woo Kin Chong v. Mary Ou Holdings Sdn Bhd [1997] 5 CLJ 164 ***(refd)***

Dyson v. A-G [1911] 1 KB 410 ***(refd)***

Ex p Lloyd [1822] Mont 70 ***(refd)***

Gan Hay Chong v. Siow Kian Yuh & Anor [1975] 1 MLJ 41 ***(refd)***

Gurbachan Singh v. Seagrott & Campbell (No 2) [1962] 28 MLJ 370 ***(refd)***

Jasabena Sdn Bhd v. Beh Heng Poo & Anor [1985] 1 MLJ 394 ***(refd)***

Jones v. National Coal Board [1957] 2 QB 55 ***(refd)***

Karpal Singh v. Sultan of Selangor [1988] 1 MLJ 64 ***(refd)***

Koh Ah Ba @ Khaw Theng Sneah & Anor (as the executors of the estate of Tan Boey Kee, deceased) v. Khau Si Moi & Anor (Mallal's Digest, 4th edn, 2001 Reissue, vol 2(1), p 128) ***(refd)***

Lee Chow Meng v. PP [1976] 1 MLJ 287 ***(refd)***

Lim Kong v. PP [1962] MLJ 195 ***(refd)***

Milson v. Carter [1893] AC 640 ***(refd)***

Mohamad Hassan & 51 Ors v. Dewan Bandaraya Kuala Lumpur & Anor [2002] 1 CLJ 290 ***(refd)***

Mohan Paramsivam v. Sepang Omnibus Company Sdn Bhd [1989] 1 MLJ 247 ***(refd)***

New Tuck Shen v. PP [1982] CLJ 38; [1982] CLJ (Rep) 606 ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***

Ooi Chew Seng v. Ultratech Sdn Bhd & Ors [1997] 5 CLJ 421 ***(refd)***

Pearl v. Bolcknow, Vaughn & Co [1925] 1 KB 399 ***(refd)***

Pearlman (Veneers) SA (Pty) v. Bernhard Bartels [1954] 1 WLR 1457

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 ***(refd)***

Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd [1986] 2 MLJ 30 ***(refd)***

R v. Clewer [1953] 37 Cr App Rep 37 ***(refd)***

R v. Feild JJ, ex p White [1895] 64 LJ MC 158 ***(refd)***

Ratnam v. Cumarasamy & Anor [1965] 31 MLJ 228 ***(refd)***

Roberts and Ruthven v. Hall [1912] 106 LT 769 ***(refd)***

Rondel v. Worsley [1969] 1 AC 191 ***(refd)***

Saipem (M) Sdn Bhd & Anor v. AG & P (M) Sdn Bhd (In Liquidation) & Ors [1996] 1 MLJ 239 ***(refd)***

Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram [2001] 3 CLJ 967 ***(refd)***

Thynne v. Thynne [1955] P 272 ***(refd)***

Yu Oi Yong & Anor v. Ho Toong Peng & Ors [1977] 1 MLJ 120 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 18(2)
Criminal Procedure Code, ss. 266, 267, 268, 272
Evidence Act 1950, ss. 121, 56, 57
Legal Profession (Practice and Etiquette) Rules 1978, rr. 16, 17, 26
Rules of the Court of Appeal 1994, r. 18(4)(b)
Rules of the High Court 1980, O. 2 r. 1, O. 29 rr. 1(2B), (A), O. 41 rr. 4, 1(8), O. 20 r. 11, O. 38 r. 1, O. 39 r. 11, Form 78(a), (b), (c), (d), 114

Other source(s) referred to:
Malaysian Court Practice, (Malayan Law Journal Sdn Bhd, 1997), vol 1, p 2515

For the plaintiff - Mahadevi Nadchatiram (J Nadchatiram & Shanti Segaram); M/s Mahadevi Nadchatiram & Partners
For the 1st & 3rd defendants - T Gunaseelan (Lum Chee Seng); M/s Lum Chee Seng & Assocs

Reported by M Maheswaran

JUDGMENT

Abdul Malik Ishak J:

***Ex Parte* Summons In Chambers In Encl. 71**

This was the plaintiff's application for the following orders:

(1) For an Order that the Third Defendant be restrained from acting or holding herself out as director of the First Defendant Company and from otherwise intermeddling with the First Defendant's affairs or in the management of the First Defendant;

(2) For an Order that the Third Defendant whether by herself, her agents or servants be restrained and an injunction be granted restraining the Third Defendant until the full and final disposal of this action or until any further order from transferring, selling, charging, pledging, disposing or dealing in any manner whatsoever with the shares, lands, assets, properties, monies in bank accounts in the name of EC Controlled Demolition Sdn Bhd or its subsidiaries;

(3) That the Third Defendant deposit all share certificates and transfer forms with this Honourable Court within 48 hours upon service of this Order upon the Third Defendant or her Solicitors;

(4) For an Order that all accounts at Maybank held by the First Defendant at Maybank Taman Segar Branch, Cheras, Kuala Lumpur be frozen pending the full and final disposal of this action;

(5) Such further or other relief that the Court deems fit;

(6) Costs.

based on the following grounds:

(1) The Second Defendant had by a deed dated 31st August 1996 irrevocably covenanted with the Plaintiff that 60% of the shares in the First Defendant out of a 68% shareholding be transferred to the Plaintiff absolutely to distribute as she deems fit;

(2) Between the date of execution of the said deed and the official search made on 29.10.97 at the Registry of Companies the Second Defendant has transferred 19,000-00 shares to the Third Defendant. As of to date the Third Defendant holds 37,999 shares. The Third Defendant is a mere nominee of the Second Defendant and has not paid any consideration for the said shares;

(3) It is therefore necessary for the Plaintiff to obtain *inter alia* an injunction restraining the Third Defendant from transferring, selling, charging, pledging, disposing or dealing in any manner of the shares, lands, assets, properties etc of the First Defendant so as to preserve the *status quo* otherwise irreparable damage will be caused to the Plaintiff;

(4) As stated in the affidavit of Kordial Kor d/o Kundang Singh filed herein in support of this application.

and supported by an affidavit in encl. 70 that was affirmed by the plaintiff on 31 December 2001 which was filed on the same day. I heard encl. 71 on 10 January 2002 and it now transpired that the second defendant by the name of Balwant Singh Chyle – a Singapore citizen, had died on 10 January 2002 in Singapore of an acute myocardial infarction with a significant alcoholic liver cirrhosis. But when I heard encl. 71 on 10 January 2002, I was not told that the second defendant had died on that day at 7.12am (see the certificate of registration of death from Singapore). Joseph Stalin used to say that:

> A single death is a tragedy, a million deaths is a statistic.

Be that as it may, the plaintiff, also a Singapore citizen deposed in her affidavit in encl. 70 that she is (was) the lawful wife of the second defendant. The plaintiff deposed and alluded to a deed dated 31 August 1996 that was made between the second defendant and herself wherein the second defendant appointed herself as a trustee of the said deed. Under the deed, provision was made by the second defendant for the maintenance, education and benefit of the second defendant and the plaintiff's three children. Pursuant to the said deed, the second defendant covenanted to transfer to the plaintiff, monies which represented 20% of the second defendant's income and profits as a 68% shareholder in the first defendant – EC Controlled Demolition Sdn Bhd, for the period commencing from January 1994 until December 1995 and thereafter to transfer to the plaintiff, on or before 31st day of June of each and every

year and on or before 31st day of December of each and every year until the trust was completely revoked, such amount of money equivalent to 20% of the second defendant's income and profits derived as 68% shareholder in the first defendant as well as the second defendant's own personal investment. It was deposed by the plaintiff that the second defendant pursuant to the said deed had irrevocably covenanted that 60% of the shares in the first defendant out of the 68% shareholding, be transferred to the plaintiff absolutely to distribute as she deems fit. It seemed that the second defendant had also simultaneously executed a declaration of trust, power of attorney and a will. A consent order dated 11 May 1999 was entered *vide* Kuala Lumpur High Court civil suit no: D1-22-134-47 between the plaintiff and the second defendant on the following terms:

(a) that the second defendant do forward to the plaintiff within 6 weeks from the date of the consent order a statement of accounts in respect of the income and profits received and a full and true statement of account in respect of the income and profits received by the second defendant from January 1994 until May 11, 1996;

(b) that all further accounts, inquiries and incidental directions and consequential orders be obtained with liberty to apply;

(c) that the second defendant do pay to the plaintiff all monies amounting to 20% of the income and profits of the second defendant as a 68% shareholder in the first defendant from January 1994 until December 1995 upon the account being taken;

(d) that the second defendant do pay to the plaintiff all monies amounting to 20% of the income and profits of the second defendant as a 68% shareholder in the first defendant and also the second defendant's personal investment from January 1996 until May 11, 1996 upon the account being taken.

It was further deposed by the plaintiff in encl. 70 that at the date of the said deed, the second defendant owned 33,500 shares. A search was conducted on 29 October 1997 and it was discovered that the second defendant had transferred 19,000 shares to the third defendant – Koh Lai Chun, in order to avoid the terms of the said deed as alluded to earlier. It was also deposed by the plaintiff in encl. 70 that on 17 November 1997 the second defendant gave her a letter to confirm that the second defendant was a 100% owner of the first defendant and that some of the shares were transferred to the third defendant in name only and that the second defendant was in the process of having those shares transferred back. It was averred that the third defendant was a mere nominee shareholder holding the said shares on trust and on behalf of the second defendant. It was deposed that the second defendant was, on

26 November 2001, admitted to the National University Singapore Hospital suffering from severe liver damage. The doctors have informed the plaintiff that the second defendant's chances of survival were slim. The doctors predictions were correct. As alluded to earlier, the second defendant had died on 10 January 2002 at 7.12am – on the very day when encl. 71 was heard.

It was further deposed by the plaintiff in encl. 70 that the second defendant had forwarded to her two letters that he had written to the defendants' solicitors requesting them that the share transfers be executed immediately so that the holdings of the first defendant will be such that the second defendant would hold 98% of the shares while the third defendant 1% and Salmi bin Mat Jusoh 1% (an individual who was not cited as a party in these proceedings). The plaintiff further deposed that her husband – the second defendant, had in her presence, by telephone from the hospital, informed his solicitor one Mr Lum Chee Seng of the urgency to carry out his (the second defendant's) instructions immediately. However, to date, it seemed that no share transfer has been executed and this meant that the second defendant's instructions have not been carried out. It was deposed that the plaintiff's solicitors have not been able to reach Mr Lum Chee Seng and despite several messages being left at the defendant's solicitor's office, Mr Lum Chee Seng had failed to respond to her solicitors. For all these reasons and in view of the critical condition in which the second defendant was in and because of the lack of response on the part of the defendant's solicitors, the plaintiff deposed that she was compelled to apply to this court for an injunction as prayed for in encl. 71. The plaintiff deposed that she verily believed that if the injunction was not granted, the third defendant may proceed to dispose off or deal with the shares in a manner that will be detrimental to her and her family and she deposed that it was in the interests of justice that an injunction be granted as prayed for in order to preserve the *status quo* pending the full and final disposal of this action and further she deposed that in order to safeguard her interest and that of her family she prayed that the third defendant be ordered to deposit the share certificates with this court within 48 hours of the order herein being served upon the third defendant or upon the third defendant's solicitors.

The plaintiff deposed in encl. 70 that the second defendant had informed her that the first defendant had its bank account at Maybank Taman Segar Branch, Cheras, Kuala Lumpur. The plaintiff then prayed that an injunction be granted restraining the defendants from operating the bank accounts and the plaintiff verily believed that if the said bank accounts were not frozen then there was every likelihood that the monies may be disposed off so as to avoid making the necessary payments under the said deed. It was deposed that the second defendant had recently informed the plaintiff that pursuant to the allocation

of shares dated 25 July 2000, the second defendant owned 29,000 shares while the third defendant being a nominee of the second defendant held 37,999 shares. It was deposed that the second defendant had instructed the company secretary by the name of Ang Chai Geok to forward to the plaintiff copies of the allocation of the shares. According to the plaintiff, the second defendant had expressly stated that the third defendant was a mere nominee for the second defendant and had not paid any consideration for the said shares. The plaintiff then craved the indulgence of the court to state that in view of the transfer of the shares to the third defendant it was necessary that an injunction be granted otherwise there may be further disposal of the shares by the third defendant as there was every likelihood that the third defendant may dispose off the shares. It was further deposed by the plaintiff that the second defendant had on 12 December 2001 forwarded to her a letter confirming that the shares were only held by the third defendant as a nominee for the second defendant and that the third defendant had not paid any consideration for the same. The plaintiff also craved the indulgence of this court to state that there were serious issues before this court and that if an *ex parte* injunction was not granted irreparable harm will be caused to her which cannot be compensated by damages and the plaintiff deposed that on the balance of convenience in order to preserve the *status quo* an *ex parte* injunction ought to be granted. The plaintiff further deposed that in seeking the injunction she gave an undertaking to pay any damages that may be caused as a result of the injunction being wrongfully obtained. The plaintiff also deposed that she had sufficient means to satisfy any damages, if any. The plaintiff then prayed for an order in terms of the application in encl. 71.

On these facts which were not ventilated at great length and having heard the submissions of the learned counsel for the plaintiff on 10 January 2002, I then gave an order in terms of encl. 71 for prayers (1), (2), (3) and the amended prayer (4). I too gave costs as per para. (6) of encl. 71. I also ordered that the plaintiff to give an undertaking as to damages and the *inter partes* hearing was fixed on 30 January 2002.

The Session On 30 January 2002

Mr T Gunaseelan assisted by Mr Lum Chee Seng acted for the first and the third defendants and they both mounted a serious objection to the admissibility of the affidavit in encl. 70. That preliminary objection was alluded to by the third defendant in her affidavit that was affirmed on 28 January 2002 which was filed on the same day as seen in encl. 76. It was quite obvious that the preliminary objection as seen in para. 5 of encl. 76 served as a notice to the plaintiff that the third defendant was not happy with the way in which encl. 70 was affirmed. Paragraph 5 of encl. 76 was worded in this way:

> Saya membantah afidavit plaintif tersebut diterima masuk oleh Mahkamah yang mulia kerana tidak ditandatangan mengikut Aturan dan Juratnya juga adalah cacat dan tidak mengikut Aturan, dan ekshibit-ekshibit yang dilampirkan sebenarnya bukanlah untuk afidavit plaintif tersebut, tetapi untuk salinan terjemahan Inggeris yang tidak mengikut Aturan.

and it served as a useful notice to the plaintiff so that the element of surprise would be totally eliminated (*Gurbachan Singh v. Seagrott & Campbell (No 2)* [1962] 28 MLJ 370 CA; *Jasabena Sdn Bhd v. Beh Heng Poo & Anor* [1985] 1 MLJ 394; *Datuk Bandar Kuala Lumpur v. Seman bin Amat & Other Cases* [1996] 3 CLJ 263; *Ooi Chew Seng v. Ultratech Sdn Bhd & Ors* [1997] 5 CLJ 421; and *Dr Woo Kin Chong v. Mary Ou Holdings Sdn Bhd* [1997] 5 CLJ 164).

Mr T Gunaseelan referred me to encl. 70 particularly at p. 22 thereof and he then drew my attention to O. 41 r. 1(8) of the Rules of the High Court 1980 ("RHC") which states that:

> A jurat must be in one of the forms in Form 78.

and he said that the word "must" should be construed as mandatory. He referred me to the case of *Mohamad bin Hassan & 51 Ors v. Dewan Bandaraya Kuala Lumpur & Anor* [2002] 1 CLJ 290 where at p. 294 of the report, I had occasion to say:

> It has often been said that the word 'must' is *prima facie* imperative and it admits of no discretion just like the word 'shall' (*Attorney General v. Parson* [1956] AC 421). The *Britannica World Language Edition of the Oxford Dictionary*, Vol 1, Part 1 defines the word 'must' to mean 'expressing necessity; obliged or required to'. The same dictionary further states that 'in the first person, must often expresses an insistent demand or a firm resolve on the part of the speaker.' The *Concise Oxford Dictionary*, 9th Edn, Thumb Index Edition defines the word 'must' to mean 'be obliged; be certain to; ought to; expressing insistence'."

Incidentally the same case was also reported in two other popular local law journals, namely, *The Malayan Law Journal* and the *All Malaysian Reports* respectively. Now, there are four Forms of Jurat in Form 78. In Form (a), the name of the interpreter must be stated. In encl. 70 at p. 22, it was submitted that even if Form (a) was the Form that was used, yet it was defective because the name of the interpreter was not mentioned. Even assuming that the relevant Form would be Form (b), yet once again the name of the interpreter was not included in encl. 70 at p. 22. And even assuming that Form (c) was the relevant Form, the name of the interpreter was not even included in encl. 70 at p. 22. It was quite obvious that Form (c) was not the

correct Form because it would be applicable to an illiterate or blind person. The plaintiff was physically present in chambers and she was in the pink of health. It was rightly submitted that Form (d) was the correct Form to use and that was used in encl. 70. A perusal of Form (d) would show that it was in relation to a deponent who could not understand the English language. It was rightly submitted that the RHC came into effect in 1980 when the English language was the language of the court and the documents were all filed in the English language. Now all the court documents should be filed in the Malay language and preferably with a translation in the English language.

The purpose of the jurat in Form (d) is crystal clear. It is when a deponent files an affidavit not in the language of the court then the person who interprets it to the language of the court must first take an oath. But, in the event that the interpretation is done by the court interpreter then using Form (d) the court interpreter need not take an oath.

The word "English" appears in Form (d) and it is ideal that it should now be substituted with the words "bahasa Malaysia". Perhaps the Rules Committee should look into the matter. Be that as it may, Form (d) is worded in this way:

> (d) To an affidavit by a person who does not understand English. Sworn (or affirmed) on the ... day of ..., 19 ... at ... through the interpretation of ... (if the interpreter is not a Court Interpreter add the following:
> the said ... having been first sworn that he had truly, distinctly, and audibly translated the contents of his affidavit to the deponent ... and that he would truly and faithfully interpret the oath (or affirmation) about to be administered unto him the said ...).
>
> Before me
> ...
> Commissioner for Oaths

I will now reproduce the "Jurat" that was employed in encl. 70 at p. 22 thereof:

> **JURAT**
>
> Saya, setelah dan sebenarnya, dengan nyatanya dan dengan dapat didengar membaca isi kandungan affidavit diatas dan menghuraikan jenis dan efek ekshibit yang disebut didalamnya dalam Bahasa Inggeris kepada deponen tersebut yang nampaknya cukup faham dengannya dan yang membubuhkan tandanya kepada affidavit itu dihadapan saya.
>
> PESURUHJAYA SUMPAH MALAYSIA
> NO. W 096
> T. THARUMARAJAH
> PN

Sgd. (Illegible).
Pesuruhjaya Sumpah
No. 54, Ground Floor
Jalan Hang Kasturi
50050 Kuala Lumpur
Kuala Lumpur 31 DEC 2001

It is quite apparent that below the jurat at the right side bottom there is a signature and a rubber stamp of a commissioner for oaths. It does not say that the commissioner for oaths had taken the oath before interpreting as required under Form (d). Affirming an affidavit is a serious matter. This court acts on the affidavit as alluded to in encl. 70 in order to decide the fate of encl. 71. There was no mention at all by the counsel who acted for the plaintiff on 10 January 2002 that the affidavit in encl. 70 contained crucial defects of the kind as alluded to by the learned counsel for the first and the third defendants. It is trite law that the court receives evidence through the affidavit provided the affidavit is properly sworn or affirmed. I venture to say that affirming an affidavit takes with it some measure of responsibility. The deponent of an affidavit must be fully satisfied that the affidavit that he is deposing complies strictly with the rigours of the law. If an affidavit contains some semblance of an untruth, the opposite party is entitled to lodge a police report against the recalcitrant deponent. In the context of the present case, there was no valid affidavit in support of the summons in chambers in encl. 71. That affidavit in support in encl. 70 was a defective affidavit because it was tainted with a defective jurat. The plaintiff who deposed the affidavit in encl. 70 can turn round and say that she cannot be held responsible because there was no valid jurat or that the affidavit was not validly affirmed and consequently she could not be prosecuted. If the plaintiff as the deponent of the affidavit in encl. 70 were to adopt these arguments must the court be sympathetic towards her. At p. 23 of encl. 70, it clearly stated that the affidavit in encl. 70 was filed by M/s Mahadevi Nadchatiram & Partners, solicitors for the plaintiff. So the question to pose would be: would M/s Mahadevi Nadchatiram & Partners be held responsible for filing the defective affidavit in encl. 70? My answer would be in the positive.

The definition of a "jurat" can be found in *Jowitt's Dictionary of English Law*, a 1977 edn, which stated that:

> Jurat, the statement at the foot of an affidavit of the names of the parties swearing it, and of the officer before whom it is sworn, of the date, and of any other necessary particulars, as that the affidavit of an illiterate or blind person was read in the presence of an officer to such person and that he seemed perfectly to understand it (RSC, O. 41 rr. 1, 3).

The *Malaysian Court Practice* (*Malayan Law Journal Sdn Bhd*, 1997), vol. 1 at p. 2515 described a "jurat" in this way:

> It refers to the clause written at the foot of the affidavit, stating when, where and before whom such affidavit was sworn.

Simply put, a "jurat" is nothing more than a certificate of the administering officer before whom the deponent affirms the affidavit.

Reverting back to the need to affirm an affidavit in the language of the court, the present case was not any different. In affirming the affidavit in encl. 70 which was prepared in the Malay language – the language of the court, the plaintiff, a Singapore citizen, needed the services of an interpreter who would interpret it to her in the English language. At p. 21 to p. 22 of the affidavit in encl. 70, the following appeared:

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN SIVIL)
GUAMAN SIVIL NO: S5-22-300-97

ANTARA

KORDIAL KOR D/O KUNDANG SINGH … PLAINTIF

DAN

1. EC CONTROLLED DEMOLITION SDN BHD
2. BALWANT SINGH CHYLE
3. KOH LAI CHUN … DEFENDAN-DEFENDAN

Berkenaan dengan suatu affidavit)
Oleh suatu pendepos Kordial Kor) Sgd. (Illegible).
D/o Kundang Singh yang diikrarkan)
Di Kuala Lumpur pada 31 DEC 2001)
(Melalui penterjemahan:

PESURUHJAYA SUMPAH MALAYSIA
No: W096
T.THARUMARAJAH
PPN

Sgd. (Illegible).
Dihadapan saya,
Pesuruhjaya Sumpah
No. 54, Ground Floor
Jalan Hang Kasturi
50650 Kuala Lumpur

Two things must be highlighted. Firstly, the name of the interpreter was not mentioned. Secondly, in the "jurat" portion as reproduced earlier someone else had purportedly interpreted to the plaintiff; but who can that be? In *Mohan Paramsivam v. Sepang Omnibus Company Sdn Bhd* [1989] 1 MLJ 247, Siti Norma Yaakob J (now FCJ) had occasion to lament about the need of a jurat in the context of a non-English speaking deponent and this was what her Ladyship said (see p. 248 of the report):

> Then again the same director has affirmed that he does not write or speak English but his affidavit does not contain any jurat and under Order 41 rule 3, his affidavit could not be used as evidence. However, under rule 4 of the same Order, such a defective affidavit may be used in evidence with the leave of the court.

Here, the situation was completely in the reverse. The deponent of encl. 70 was a non-Malay speaking individual, but sadly there was no application by the plaintiff through her solicitors to use the affidavit in encl. 70 with the leave of the court. This meant that the affidavit in encl. 70 cannot be used as evidence at all. The rules must strictly be complied with. There are consistent and strong judicial opinions in regard to the need to adhere strictly to the rules of the court. Chang Min Tat J in *Yu Oi Yong & Anor v. Ho Toong Peng & Ors* [1977] 1 MLJ 120, 121 aptly said:

> There should, in my view, be some adherence to the rules of court, unless required by circumstances, if there is to be any meaning or purpose in such rules.

Ajaib Singh J in *Gan Hay Chong v. Siow Kian Yuh & Anor* [1975] 1 MLJ 41 made a ruling to the effect that the mistake or oversight by the solicitor for the appellant was fatal and his Lordship refused to exercise his discretion in favour of the appellant. This was what his Lordship said (see p. 43 of the report):

> The rules are there to be followed and they may be relaxed in the interest of justice only if sufficient cause is shown. The procedural handmaid cannot, without good reason, come to the rescue of slow-moving litigants and their legal advisers.

The Privy Council in *Ratnam v. Cumarasamy & Anor* [1965] 31 MLJ 228, 229 spoke of the Rules of Court in these fashions:

> The Rules of Court must *prima facie* be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation

Abdul Malik Ishak J in *Dato' Wong Gek Meng v. Pathmanathan Mylvaganam & Ors* [1998] 1 CLJ 625 sounded the same warning:

> In my judgment, strict and dutiful adherence to forms and rules especially to the RHC will, in the long run, ensure an efficient bar and with it, hopefully, a speedy and efficient administration of justice. Objections to technicalities must be viewed *prima facie* as non-compliance with the rules and the defaulters must pay dearly for it. It is obsolete now to adopt the old-fashioned attitude that the rules of the RHC are intended to facilitate and not impede the administration of justice. On the contrary, the administration of justice would be curtailed if the rules embodied in the RHC are not religiously followed. With the advent of the Multimedia Super Corridor, lawyers cannot afford to adopt a lackadaisical attitude nor can they wring their hands and say that the courts would show mercy to them. As a code of procedure, the RHC should be strictly followed to the letter.

It was quite obvious that the mistake or the oversight in preparing the affidavit in encl. 70 must rest on the shoulders of the learned counsel that prepared the affidavit in question. And that learned counsel was none other than Madam Mahadevi Nadchatiram. It was also quite obvious that the conduct of the plaintiff's case in so far as encl. 71 was concerned was in the entire control of M/s Mahadevi Nadchatiram & Partners. I have said in *BSN Commercial Bank (M) Bhd v. Pentadbir Tanah Daerah, Mersing* [1997] 3 CLJ Supp 1 that the case of *Rondel v. Worsley* [1969] 1 AC 191, [1967] 3 All ER 993, HL, must be read in the context that in England the legal profession was not fused. Here in Malaysia, the legal profession is a fused one. Some members of the legal profession in Malaysia choose to practise their trade as solicitors in the fields of conveyancing and corporate affair. The rest choose to practise their trade in a dual capacity – putting their hands in all the pies, so to speak. The conduct and responsibilities of these hardworking advocates and solicitors are governed by the Legal Profession (Practice and Etiquette) Rules 1978 *vide* P.U. (A) 369/78. Foremost and of great importance to remember is this. That the counsel's principal duty is to the court and this would be followed by his duty to his client (*Saipem (M) Sdn Bhd & Anor v. AG & P (M) Sdn Bhd (In Liquidation) & Ors* [1996] 1 MLJ 239). My role as a judge is quite simple. It is to adopt an objective stand in order to find out the truth and at the same time to do justice according to law. All I need do is to listen to the evidence as well as listen to the arguments of counsel from both sides. When necessary to clear up any confusion, I am empowered to ask questions of witnesses as well as their counsel (*Jones v. National Coal Board* [1957] 2 QB 55, [1957] 2 All ER 155 CA). But of late, some lawyers are not too happy if a judge asks question to clear up any confusion. All judges ask pertinent questions in the course of adjudicating cases. In the context of this case, I exercised restrain. I merely listened attentively and wrote copiously.

So much for the brief digression.

The plaintiff also affirmed an affidavit on 30 January 2002 which was filed on the same day as seen in encl. 75 and that affidavit too suffered from the same defects. At p. 4 of encl. 75, the following appeared:

(5) Oleh yang demikian saya memohon untuk Perintah seperti dipohon Saman Dalam Kamar saya bertarikh 31hb Disember 2001.

Berkenaan dengan Afidavit oleh)
Deponen bernama Kordial Kor d/o) Sgd. (Illegible).

Kundang Singh diikrarkan pada)
30hb Januari 2002 di Kuala Lumpur)
(Melalui Penterjemahan:

Di hadapan saya,

PESURUHJAYA SUMPAH MALAYSIA
KUALA LUMPUR
A WO19
GURCHARAN KAUR
MAHKAMAH TINGGI
JALAN AMPANG

Sgd. (Illegible). 30/1/02

JURAT

Saya, setelah dengan sebenarnya, dengan nyatanya dan dengan dapat didengar membaca isi kandungan afidavit di atas dan jenis dan efek ekshibit yang disebutkan didalamnya dalam Bahasa Inggeris kepada deponen tersebut yang nampaknya cukup faham dengannya dan yang membubuhkan tandanya kepada afidavit itu dihadapan saya.

Dihadapan saya,

PESURUHJAYA SUMPAH MALAYSIA
A WO 19
GURCHARAN KAUR
MAHKAMAH TINGGI
JALAN AMPANG
KUALA LUMPUR

Sgd. (Illegible). 30/1/02

This time round, the commissioner for oaths come from the High Court at Jalan Ampang. It is well and good but there are two reasons why encl. 75 should suffer the same fate as encl. 70:

(1) It did not say that this particular commissioner for oaths had interpreted the contents of the affidavit in encl. 75 to the deponent – the plaintiff herself. After the words, "(Melalui Penterjemahan)" nothing was written thereunder. Now, looking at the "jurat", the words employed were, "Saya, setelah ... " but it did not mention any name in particular. Taken in its correct perspective, the "jurat" would suggest that this particular commissioner for oaths did not interpret the contents of encl. 75 to the plaintiff as the deponent but rather somebody else had interpreted it. This seemed to be the case because just below the "jurat", the following words appear, "Di hadapan saya," – meaning "Before me". This meant that whoever had interpreted the contents of encl. 75, it had been done before this particular commissioner for oaths. Language is a crucial tool in law and a poor command of the language would give rise to confusion.

(2) There was mention that this particular commissioner for oaths came from the High Court at Jalan Ampang but there was no mention at all that this particular commissioner for oaths held the post of a court interpreter. Only certificated interpreters are authorised to interpret.

There is another point that needs mention. It is this. The plaintiff in her affidavit in encl. 75 described herself as a Malaysian citizen while in her affidavit in encl. 70 she described herself as a Singapore citizen. Why did the plaintiff adopt these legal manoeuvrings? I dare not venture an answer.

Mr T Gunaseelan submitted that it was not for the parties to submit that there was an error in typing – a typographical error, because all corrections must be made according to the set procedures. I entirely agree with his submissions. There is power given to the court to make any amendment provided it is done according to the rules as set out in the RHC. There was no formal application to amend and this court could not do anything about it. Being defective, both encls. 70 and 75 must be disregarded. Without the affidavit in support in encl. 70, the summons in chambers in encl. 71 must automatically collapse. It was rightly submitted that when a party moved a court on an *ex parte* application, the court will invariably rely on the affidavit in support and the court would naturally expect due compliance with the rules bearing in mind that the court will not hear the adversary at that point in time.

Madam Mahadevi Nadchatiram submitted that a letter dated 29 January 2002 was sent to her and in that letter the preliminary objections that were raised were not so extensive as the submissions advanced by Mr T Gunaseelan. According to her that letter merely alluded to the preliminary objections pertaining to the affidavit and the jurat. She pointed out that the case of *Mohamed bin Hassan & 51 Ors v. Dewan Bandaraya Kuala Lumpur & Anor (supra)* was not on the issue of a "jurat" but rather it was confined to the

interpretation to be attached to the word "must". She pointed out that the same mistakes also appeared in the affidavit in reply of the second defendant – Balwant Singh Chyle, that was affirmed on 2 December 1997 and filed on the same day as seen in encl. 21 at p. 5 thereof. She submitted that the plaintiff was not objecting to encl. 21 and this court had accepted encl. 21 and so she submitted that the affidavits in encls. 70 and 75 ought to be accepted by this court. In regard to encl. 75, she submitted that it was sworn in court and the wordings thereto were very clear. It was her submission that encl. 75 was done in court and was accepted by the court and it was prepared in the presence of "Gurcharan Kaur, Mahkamah Tinggi, Jalan Ampang." She submitted that the words appearing in encl. 75 which read, "Saya, setelah dengan sebenarnya," referred to Gurcharan Kaur. She further added that the words employed in encl. 75 at p. 4 which read, "Di hadapan saya" were clear and it had identified the interpreter and it was not necessary to put the name of the interpreter in the "jurat". According to her, the first and the third defendants have responded to encl. 70 by filing encls. 76 and 77, and this showed that they have taken steps. She then showed me a newspaper cutting of the local daily – "The Sun" dated 30 January 2002, and she then read excerpts from it. She said that the newspaper cutting at p. 6 thereof alluded to the call by Justice Datuk Gopal Sri Ram, a Court of Appeal judge, where his Lordship had reportedly said:

> I must be forgiven for expressing my amazement and equal disappointment that at this day and age, applications and suits are disposed of on purely technical and procedural grounds without the slightest attempt to do justice according to the merits of the particular case.

In short, his Lordship Gopal Sri Ram JCA deplored throwing out cases on mere technicalities which resulted in an injustice. She then implored this court to take note of the presence of the plaintiff in chambers and she said that the plaintiff understood the Malay language.

Mr T Gunaseelan responded and he rightly submitted that it was not for counsel at the bar table to say whether the plaintiff deponent was able to understand the Malay language. Indeed this was a correct proposition of the law. In *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609, the Court of Appeal said that it was not for counsel to give evidence at the bar table. Thus, on record there was nothing to show that the plaintiff deponent was able to understand the Malay language.

Mr T Gunaseelan then reiterated that the notice of the preliminary objections as alluded to in para. 5 of encl. 76, which was reproduced earlier, was made *bona fide* and was sufficient to alert the plaintiff. I would entirely agree with him. There was no basis whatsoever to say that the notice of the preliminary objections was not made *bona fide.* As I see it, Madam Mahadevi Nadchatiram

was clutching at straws when she proceeded to submit on behalf of the plaintiff. She appeared bewildered and the quality of her submissions were not befitting the noble profession which all of us know of. It was certainly unfortunate.

In regard to the affidavit in reply of Balwant Singh Chyle – the second defendant, in encl. 21 which was said to suffer the same impediments as encls. 70 and 75, Mr T Gunaseelan replied in this way. He said that two wrongs cannot make a right. The mere fact that the solicitors for the second defendant had made a mistake in the past, it did not mean that it justified a similar conduct in the future. There can be no waiver in this regard. I totally agree with his submissions.

In regard to the newspaper cutting that was not annexed to any affidavit but was bandied around by Madam Mahadevi Nadchatiram, I have this to say. It was wrong for the learned counsel to rely on a newspaper cutting because, as was said by Wan Yahya J (who later rose to be a Supreme Court judge) in the case of *New Tuck Shen v. PP* [1982] CLJ 38; [1982] CLJ (Rep) 606 that:

> Newspaper reports of court cases are, by no means, absolutely accurate verbatim reports of what actually transpired in the court room. Prolific writers of the press, eager to ensure more exciting and widespread public reading of their articles, at times resort to the use of different expressions from those actually used in court so as to stimulate the normally dull court case into a more intriguing and emotional story.

That newspaper cutting should be annexed to an affidavit so that the learned counsel for the first and the third defendants could effectively respond to it. But of pertinence would be the judgment of Abdul Hamid Omar CJ (Malaya) (who later rose to be the Lord President of the Supreme Court) in the case of *Karpal Singh v. Sultan of Selangor* [1988] 1 MLJ 64. There his Lordship said at p. 65 to p. 66 of the report:

> Court's observation
>
> Before I consider the grounds, I would, in passing, observe that the sole foundation of the Originating Summons is the statement allegedly made by the Sultan as reported in the New Straits Times and The Star newspapers on July 27, 1987. There is no affidavit before the Court affirmed to by the reporter concerned stating that he heard the Sultan made such statement. The press reports of what the Sultan is reported to have said would appear to be inadmissible as hearsay. The fact that the Sultan has not contradicted the press reports does not, in my view, make the slightest difference for it is well-established that inadmissible evidence does not become admissible by reason of a failure to object.

> I would also observe that there seems to be a flaw in the plaintiff's case in that, it is common knowledge, the Sultan invariably speaks in Bahasa Malaysia and in that event the press reports of what the Sultan is alleged to have said would therefore have been a translation thereto. If so, who did the translation and was it accurate? Where is the translator's affidavit affirming the accuracy of the contents of the translation? In the absence of such an affidavit, the press reports would clearly be inadmissible.
>
> Without the press reports, what other evidence is there to show what the Sultan said on the occasion concerned? In my view, therefore, the Originating Summons founded upon such premises may be held to be groundless. The judgment I am about to pronounce, however, is not founded upon such premises.

In regard to the argument pertaining to encl. 75 to the effect that the contents of the said affidavit had been interpreted by Gurbachan Kaur to the plaintiff deponent, Mr T Gunaseelan rightly pointed out that an inference cannot be drawn to that effect because if that had actually happened why did Gurbachan Kaur use the words, "Di hadapan saya" – meaning that the interpretation was done in front of her. Surely Gurbachan Kaur could not have interpreted those words before herself.

In regard to the filing of encls. 76 and 77 in response to encl. 70, that cannot be taken as having taken the necessary steps to prevent Mr T Gunaseelan from raising the preliminary objections against the admissibility of encl. 70. Both encls. 76 and 77 contained averments preserving the rights of the first and the third defendants to challenge the summons in chambers in encl. 71 and the *ex parte* interim injunction that was granted on 10 January 2002. The material averment in encl. 76 at para. 4 was worded in this way:

> Afidavit ini diikrarkan untuk menyokong saman defendan tersebut, dan menentang dan membantah saman kedua plaintif tersebut dan perintah injunksi *ex parte* kedua.

This would be followed by para. 4 of encl. 77 which categorically stated that:

> Afidavit ini diikrarkan untuk menyokong saman defendan tersebut, dan menentang dan membantah saman kedua plaintif tersebut dan perintah injunksi *ex parte* kedua, tanpa memprejudiskan hak saya untuk membangkitkan bantahan amalan terhadap afidavit plaintif tersebut atas alasan yang dinyatakan dalam afidavit kedua defendan ketiga tersebut.

These averments left intact the rights of the first and the third defendants to raise those preliminary objections as alluded to in this judgment.

In the case of *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram* [2001] 3 CLJ 967, I did say that if an affidavit is irregular in form, the court may give leave for that affidavit to be filed or used in evidence under O. 41 r. 4 of the RHC. But in the context of the present case, the irregularity was not in regard to the form but rather in regard to the substance of the matter. I venture to add that an irregularity of an affidavit in regard to its substance can never be cured under O. 2 r. 1 of the RHC. The cases of *BSN Merchant Bank Bhd v. Perikanan LKPP Fort Sdn Bhd* (Mallal's Digest, 4th edn, 2001 Reissue, vol. 2(1) at p. 129); and *Koh Ah Ba @ Khaw Theng Sneah & Anor (as the executors of the estate of Tan Boey Kee, deceased) v. Khau Si Moi & Anor* (Mallal's Digest, 4th edn, 2001 Reissue, vol. 2(1) at p. 128) were of no help to the plaintiff at all because these cases spoke of breaches in the affidavits which were mere irregularities in its forms or were considered to be curable under O. 2 r. 1 of the RHC.

Mr J Nadchatiram joined in the affray. He submitted that Mr T Gunaseelan was splitting hairs by submitting in the way in which he did. For the record, I have no objections to the manner in which Mr T Gunaseelan conducted the present case. I have allowed counsel for both sides to submit fairly and strongly without any undue interruption so that the sequence of the submissions would not be broken (*Ex p Lloyd* [1822] Mont 70; and *R v. Clewer* [1953] 37 Cr App Rep 37, CCA). In fact, I did not even interrupt the progress of the submissions of the parties. The hearing on 30 January 2002 went on smoothly without a single hitch.

Undaunted, Madam Mahadevi Nadchatiram submitted that the slip rule should be applied in order to amend the plaintiff's citizenship from "Singapore" that appeared in encl. 70 to "Malaysia" so that it will synchronise with encl. 75 which described the plaintiff as a Malaysian citizen. That was indeed a surprise move as the plaintiff had shown to this court her Singapore passport bearing number S2012381H when she attended court on 30 January 2002. Even the affidavits in encls. 70 and 75 stated that the plaintiff held a Singapore passport bearing number S2012381H. Surely a Malaysian citizen residing in Singapore would be in possession of a Malaysian passport and not a Singapore passport. I reiterate that I was shown a Singapore passport by the plaintiff when she attended court on 30 January 2002 and this fact was also recorded in the notes of evidence. The plaintiff is a Singapore citizen and there are no two ways about it. An official note book will be used by judges to record all the notes of evidence. The present case was not an exception. The submissions of the case and the materials of the case were recorded by me in long hand. It was a laborious exercise but it must be done. There are no specific provisions governing recording of submissions and the evidence of witnesses in long hand in an official note book. But by implications, it can be implied from the following provisions:

(1) section 18(2) of the Courts of Judicature Act 1964 (Act 91);

(2) rule 18(4)(b) of the Rules of the Court of Appeal;

(3) section 266 of the Criminal Procedure Code (governing the role of a magistrate in a summons case);

(4) sections 267 and 268 of the Criminal Procedure Code (where evidence is recorded in a narrative form by the magistrate and according to the magistrate's discretion);

(5) section 272 of the Criminal Procedure Code (where judges are required to take down evidence); and

(6) see O. 38 r. 1 and O. 39 r. 11 of the RHC.

It is interesting to note that the judge's note book is not kept at the registry and so there is no right of inspection. It is a practice to apply to the judge's secretary for a typewritten certified true copy of the judge's notes recorded in the note book. In Appendix "B", at item 69 of the RHC, the secretary or the court stenographer will be paid per folio for the certified copy of the judge's notes as recorded in the note book. It would be ideal to reproduce item 69 of Appendix "B" to the RHC:

> On making a copy [or a certified copy] for each folio … … … … [$2.00]
> For every second or subsequent copy if "carbon" or by duplicating process for each folio … … … … [$1.00]
>
> Note – where a certified copy of a Judge's note or judgment is by his leave made and supplied by his Secretary or Court Stenographer, the above fee shall be paid to and retained by such Secretary or Court Stenographer for his personal benefit, [provided that this fee shall be payable only if such secretary or stenographer does not claim overtime allowance from the Government for preparing such certified copy.]

It is also useful to note that under s. 121, illustrations (a), (c) of the Evidence Act 1950 (Act 56), a judge cannot be compelled to answer questions as to the manner in which the judge has recorded the evidence given before him. The sum total of it all would be this. That the notes of evidence as recorded by the judge in the judge's note book and later typed by the secretary or the court stenographer with the leave of the judge must be taken to be conclusive and beyond question. So what this boils down to would be the singular fact that the plaintiff here held a Singapore passport bearing number S2012381H. How could Madam Mahadevi Nadchatiram have requested this court to simply

delete the word "Singapore" in encl. 70 which denotes the plaintiff's citizenship and substitute it to "Malaysia" so that it would synchronise with encl. 75 as alluded to earlier? It is interesting to note that the death certificate of the second defendant – Balwant Singh Chyle, which was styled as the "certificate of registration of death" carried the "NRIC/Identification Document No:" of the deceased second defendant as S1064841F. The same death certificate carried the name of the informant to be "Gorbechan Singh s/o Sucha Singh", bearing "NRIC/Identification Document No: S1064857B". I used to serve in the Johor Bahru High Court in the present capacity for 5 1/2 years and have had witnesses and parties from Singapore testifying in my court and all of them will show me their NRICs and passports when they testify before me. One notable similarity would be that their passport numbers tally with their NRIC numbers and there would always be the alphabet "S" before the digital numbers. I even venture to say that it is common knowledge and judicial notice can be taken that the Singapore passport number given to a Singapore citizen must tally with the NRIC number of that Singapore citizen. Thus, the Singapore passport bearing number S2012381H belonging to the plaintiff gave away her true identity to this court. The plaintiff is a Singapore citizen and Madam Mahadevi Nadchatiram as her counsel should know about this and yet she had the audacity to ask this court to alter the word "Singapore" appearing in encl. 70 to that of "Malaysia". Why did she do so? I dare not venture an answer. Of course under r. 16 of the Legal Profession (Practice and Etiquette) Rules 1978, an advocate and solicitor must without offending the court before which he is appearing fearlessly uphold the interest of his client, the interest of justice and dignity of the profession without regard to any unpleasant consequences to himself. But in doing all these noble gestures, the advocate and solicitor should not knowingly deceive or mislead the court (see rr. 17 and 26 of the Legal Profession (Practice and Etiquette) Rules 1978). The advocate and solicitor must put the interest of the court before all else. It is ideal to read the case of *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793 on what an advocate and solicitor should not do.

In *Dato' Wong Gek Meng v. Pathmanathan Mylvaganam (supra)*, at pp. 634-635 of the report, I had occasion to say something about the obligations of an advocate and solicitor to a court. This was what I said:

> *Solicitor's obligations towards the court*
>
> A solicitor has a professional obligation to observe the standard of conduct required of members of his profession, particularly to conform to the Legal Profession Act 1976 ('the Act') and the Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules'). Under s. 77 of the Act, the Bar Council

may, with the approval of the Attorney General, make rules for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors. For the purpose of this judgment, rr. 15, 17 and 18 of the Rules should be referred as they give the pith and the depth of Mr Mahalingam's duty to this court. Thus r. 15 states that:

> An advocate and solicitor shall maintain a respectful attitude towards the Court.

Rule 17 states that:

> An advocate and solicitor shall not practice any deception on the Court.

Finally, r 18 states that:

> The conduct of an advocate and solicitor before the Court and in relation to other advocates and solicitors shall be characterised by candour, courtesy and fairness.

Great care has to be exercised when a solicitor is dealing with the court. As an officer of the court, the solicitor must not do anything so as to deceive the court. The time has come for the courts to adopt a stringent approach and castigate lawyers who by deception deceive the courts into believing that concessions made by the lawyers to strike out their appeals, like the present case, would end the adjudication, once and for all. Stringency is desirable to prevent breaches of the Rules. Section 94(3) of the Act defines 'misconduct' to mean conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety and includes:

> (d) breach of any rule of practice and etiquette for the profession made by the Bar Council under this Act or otherwise.

It is instructive to note that an allegation of conduct unbefitting a solicitor has been held to be substantiated against a solicitor where that solicitor wilfully misled the court: *Re Hill* [1868] LR 3 QB 543; *Stephens v. Hill* [1842] 10 M & W 28; and *Re Cooke* [1889] 33 Sol Jo 397 (CA). Authorities are abound as to what would constitute misconduct. Misconduct in proceedings may extend to bringing vexatious and frivolous proceedings (*R v. Fielding* [1758] 2 Burr 654 and *Cockle v. Whiting* [1829] 1 Russ & M 43), or it may even extend to knowingly filing the action knowing that there is no reasonable cause of action or, for that matter, defending an action on the basis of flimsy defences having little or no chance of success (*Rolfe v. Rogers* [1811] 4 Taunt 191 and *Taylor v. Lawrence* [1892] 27 L Jo 422) or filing proceedings which are fraudulent (*Dundas v. Dutens* [1790] 1 Ves 196) or, finally, filing what may be termed as instituting unnecessary proceedings (*Re Parker* [1819] Buck 313). But misconduct that will stir the court to life and that will receive the vehement disapproval of judges the world over would be deception. To practise deception

on the court would be akin to 'ridiculing' the court. That would be misconduct so grave that words could not describe it.

Whyatt CJ in *Yee Chang & Co Ltd v. NV Koninklijke Paketvaart Mattschappij* [1958] MLJ 131 at p 133 remarked that:

> ... a solicitor owes a duty to the court to conduct litigation with due propriety and to assist in promoting in his own sphere the cause of justice. If, therefore, a solicitor becomes aware in the course of proceedings that his client is obstructing the interests of justice, it is his duty to advise his client as to the conduct which he ought to follow and if the client still persists in his wrong conduct, he should decline to act for him further.

In *Cheah Cheng Hoe v. PP* [1986] 1 MLJ 299, the concealment of an important document (from) the court was considered contemptuous conduct and that the solicitor's duty to the court was said to be paramount and outweighed the solicitor's duty to the client.

It is a correct statement of the law to say that the solicitor should fearlessly conduct the cause of action having both his duty to the court as well as his duty to his client in mind, but the solicitor must always be mindful of the paramountcy of his duty to the court (*Myers v. Elman* [1940] AC 282 and *Clark v. Girdwood* (1877-78) 7 Ch D 9).

No doubt these salient legal niceties were said in the context of Mr Mahalingam admitting that he had changed the format as set out in Form 114 of the RHC, yet these sage words would also apply to Madam Mahadevi Nadchatiram who had the audacity to apply to this court to delete and substitute the word "Singapore" appearing in encl. 70 to that of "Malaysia" notwithstanding the fact that the plaintiff is a Singapore citizen. That would be the gravamen and the culpability of the matter. Be that as it may and as a matter of interest *Dato' Wong Gek Meng*'s case was also reported in the *Malayan Law Journal vide* [1998] 5 MLJ Supp 560.

In regard to the judicial notice which I alluded to earlier, I have this to say. Sections 56 and 57 of the Evidence Act 1950 deal specifically with judicial notice. In *Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd* [1986] 2 MLJ 30, 31, Syed Agil Barakbah SCJ had this to say on the subject of judicial notice:

> Now the general rule is that all facts in issue and relevant facts must be proved by evidence. There are, however, two classes of facts which need not be proved, *viz,* (a) facts judicially noticed and (b) facts admitted. The exceptions are dealt with by sections 56, 57 and 58 of the Evidence Act 1950 under the title 'Facts which need not be proved'.

Abdul Hamid Omar J (who later rose to be the Lord President of the Supreme Court) aptly said in *Lee Chow Meng v. PP* [1976] 1 MLJ 287, 288:

> Courts have even taken judicial notice that streets in London are crowded and dangerous – (*Dennis v. White* [1916] 2 KB 1, 6); and of world-wide economic depression – (*Ram Tarak v. Selgrant* [1944] AC 153).

It may be argued that the general knowledge which I had acquired whilst serving in the Johor Bahru High Court cannot be used as a leverage to give rise to a judicial notice of a Singapore citizen having the same digital number in both the NRIC and the passport. By way of an answer thereto, reference should be made to the case of *Lim Kong v. PP* [1962] MLJ 195, 197 where Adams J succinctly said:

> Mr. Marshall also objected to the President drawing on his own knowledge concerning fresh elephant droppings and the prevalence of wild boar and deer on this stretch of road. A President in the course of his duties is bound to travel up and down the length and breadth of his circuit and he obviously cannot keep his eyes shut. ... The President who travels this road frequently can use the general information of his own eyes of the physical features of an area well known to him for general purposes.

and likewise here what had transpired during court proceedings in High Court Johor Bahru cannot be kept away from my 'own eyes' to see and acknowledge because the facts were sufficiently notorious that it was proper to assume its existence without proof. The speech of Lord Sumner in the case of *Commonwealth & Co v. Peninsular & Co* [1923] App Cas 191, 210 should also be reproduced as it would surely be an eye opener. There his Lordship said:

> To require that a judge should affect a cloistered aloofness from facts that every other man in court is fully aware of, and should insist on having proof on oath of what as a man of the world he knows already better than any witness can tell him, is a rule which may easily become pedantic and futile.

Two latin terms, quite attractive by themselves, immediately come to mind. The first would be *lex non requirit verificare quod apparet curiae* (the law does not require proof of that which is apparent to the court). The second would be *quod constat curiae opere testium non indiget* (that which is established to the knowledge of the court does not require the aid of witnesses). In *Roberts and Ruthven v. Hall* [1912] 106 LT 769, Cozens-Hardy MR was of the view that an arbitrator was entitled to act on his general knowledge pertaining to the conditions of the labour market then prevailing particularly in regard to the rate of wages for the type of work that could be earned in that locality. Adopting the same line of approach, Scrutton LJ in *Pearl v. Bolcknow, Vaughn & Co* [1925] 1 KB 399, 419 aptly said:

> The county Court Judge, acting as an arbitrator and sitting in a district where he is very familiar with labour conditions, may use his own knowledge as to the probable wages, probable employment for like work, and conditions of labour ... it would be a denial of justice to require these facts to be continually proved.

As opposed to general knowledge there is also personal knowledge which a judge is entitled to rely upon. This is amply demonstrated in the case of *R v. Feild JJ, ex p White* [1895] 64 LJ MC 158 where a grocer was charged for selling adulterated cocoa. The issue that the court had to consider was whether the cocoa must necessarily contain some foreign ingredients. It transpired that Admiral Feild and the chairman of the petty sessions together with two other Justices had used their personal knowledge which they had acquired while they were in the navy to decide the issue. Wills J, a distinguished mountaineer himself, agreed with this line of approach and at p. 160 of the report this was what he said:

> In the nature of things, no one in determining a case of this kind, can discard his own particular knowledge of a subject of this kind. I might as well be asked to decide a question as to the sufficiency of an Alpine rope without bringing my personal knowledge into play.

Judges must be bold and be forward looking. Judicial notice premised on either general knowledge or personal knowledge must be acknowledged as the surest way to expedite the process of a trial. Be that as it may, in the context of the present case, I was shown the Singapore passport of the plaintiff in chambers and what I saw with my own eyes would be sufficient to conclude that the plaintiff is indeed a Singapore citizen. This was my judgment and I so hold accordingly.

In answer to the argument in regard to the slip rule, Mr T Gunaseelan referred me to O. 20 r. 11 of the RHC and he submitted that it related to clerical mistakes in judgments or orders or errors arising thereto. To be exact, I shall now reproduce O. 20 r. 11 of the RHC and it is worded in this way:

> Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by summons without an appeal.

As I see it, this rule applies in cases where there is a clerical mistake in a judgment or order or an error arising from an accidental slip or omission. Of course, apart from this, the court has an inherent power to vary its own orders in order to give effect to its meaning and to make its meaning as plain as possible (*Thynne v. Thynne* [1955] P 272 CA; *Pearlman (Veneers) SA (Pty.) v. Bernhard Bartels* [1954] 1 WLR 1457; [1954] 3 All ER 659, CA; and *Milson v. Carter* [1893] AC 640). It would not be wrong to say that O. 20 r. 11 of the RHC does not apply to an affidavit and that being the case this court has no right to invoke the "slip rule" in favour of the plaintiff. At any

rate, there was no "slip" at all because the plaintiff is in fact a Singapore citizen as can be seen from her passport number.

Conclusion

For all these reasons, I made the following rulings:

(1) that encls. 70 and 75 will not be considered by this court because of their defectiveness; and

(2) that the *inter partes* hearing for encl. 71 should be dismissed with costs.

The life span of an *ex parte* interim injunction that was granted on 10 January 2002 entered its 21 days by today – referring to 30 January 2002, and it must automatically lapse (see O. 29 r. 1(2B) of the RHC and O. 29 r. 1(2BA) of the RHC) bearing in mind that there was no affidavit in support of encl. 71 since that very affidavit in encl. 70 has been ruled by me to be defective. Its defectiveness also extended to encl. 75. Thus, I now made a ruling that:

(3) the *ex parte* order of this court dated 10 January 2002 as seen in encl. 73 should be discharged forthwith; and I also ruled that:

(4) damages to be assessed by the learned deputy registrar.

Mr T Gunaseelan informed this court that yesterday – referring to 29 January 2002, the share certificates were deposited in court pursuant to the *ex parte* interim injunction and he then craved the indulgence of this court to return the share certificates to the third defendant forthwith. I then made the necessary order as sought for by him in favour of the third defendant.

Madam Mahadevi Nadchatiram requested this court to grant a stay pending appeal. This was vehemently opposed by Mr T Gunaseelan and he argued that since the application in encl. 71 was non-existent due to the defect in the affidavit in support in encl. 70, then this court should not allow a stay. Madam Mahadevi Nadchatiram replied and she submitted that if a stay was not granted, several sums of monies in the bank would be depleted and irreparable damage will be done. Mr T Gunaseelan responded and he submitted that in the affidavits that were rejected by this court – referring to encls. 70 and 75, there was nothing to show that there was any risk of dissipation and that what was said at the bar cannot be accepted by this court. He too prayed that the application for a stay be denied. I then made a ruling to the effect that the oral application for a stay was disallowed and I advised the plaintiff to file a formal application for a stay.

I have refused the stay because of the need to exercise great care and circumspection so as not to drive the first and the third defendants from the judgment seat (*Dyson v. A-G* [1911] 1 KB 410 at 419, CA). To me, the very essence of justice required that the stay be refused. There were no special circumstances to warrant a stay.